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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 709

DAVID PLEASON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, David Pleason, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINIONS OF THE COURTS BELOW.

The Opinion of the Tax Court (R. 260-263) was filed May 20, 1954, and is published at 22 T. C. 361. The decision of the Tax Court determining deficiencies and penalties and overruling petitioner's objections to respondent's computation, was entered September 17, 1954. (R. 271, 272).

The Opinion of the United States Court of Appeals for the Seventh Circuit, affirming the decision of the Tax Court was filed November 2, 1955, and is reported at 226 F. 2d 732. (A copy of this Opinion is appended to the petition).

JURISDICTION.

On November 25, 1955, the Court of Appeals below denied the petition for rehearing. (This order and the judgment of the Court of Appeals on November 2, 1955, appear in the Appendix). This petition is filed within ninety days of the denial of the petition for rehearing by the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Did the Court of Appeals err in sustaining an arbitrary and unsubstantiated determination by the Tax Court, which in effect, holds that because there was no measure by which retention by petitioner of any amount of over-ceiling receipts could be ascertained or found, therefor, on the theory that the petitioner would not incur the risks of the activity without gain, he must have kept something, and this amount was arbitrarily and without reasonable basis, fixed at Fifty Thousand Dollars in one year and Five Thousand in the other year involved, under purported authority of rule of *Cohan* v. *Commissioner*, 39 F. 2d 540, 544?

2. Where the petitioner introduced evidence and his testimony that all over-ceiling amounts received for merchandise were passed on, and paid to suppliers of merchandise, and Tax Court stated disbelief of respondent Commissioner's witnesses in denial, is it proper to con-

jecture and guess that some of such money must have been retained by petitioner, and to conjecture or guess as to the amount, without substantial evidence to support these conclusions?

3. Where Tax Court has determined that income from a business conducted by petitioner's daughter was, in fact, true income and property of petitioner, and belonged to him and must be charged to him, and a large amount of said income was paid by daughter as income taxes on income from the business, is it consistent with the Constitution and statutes to assess petitioner for a "deficiency" and fraud penalty on such amount paid as taxes from income from the business, judicially construed to be property of the petitioner, and chargeable to him?

4. Is it not error for the Court of Appeals to affirm a decision of the Tax Court which holds that income from a business is the property of the petitioner and was in his control and is chargeable to him, but denies petitioner credit for income taxes paid from and upon business income by daughter, in whose name business was conducted?

STATEMENT OF THE CASE.

The matters in issue arise from the conduct of a wholesale liquor business at Cairo, Illinois, during the taxable years 1943 and 1944.

The petitioner, David Pleason, as an individual had conducted the business of a wholesale liquor dealer at Cairo, Illinois, for several years prior to September 1941. In September 1941, because of legal difficulties and inability to obtain necessary licenses, the petitioner ceased business and closed the premises at which the business

was conducted. In December of 1941, business was commenced by his daughter, Ann Davis, doing business as Royal Distillers Products. This business was conducted at the same premises which had been used by the petitioner, and some of the same employees were hired. The petitioner became the General Manager for his daughter. A capital of $5,000.00 was loaned to her by him, and was repaid from profits from the business. The daughter secured the necessary licenses from the State of Illinois, and applied for a Federal Basic Permit in her own name.

Ann Davis, the petitioner's daughter, reported the income from the business as her own income for the taxable years in question, 1943 and 1944, and paid a total of $49,884.93 as income taxes, which amount was paid from the profits of the business. The petitioner reported and paid taxes on the calendar year basis on salary and commissions paid to him as an employee of his daughter. Ann Davis testified that she regarded the income as her own and, therefore, did not apply for any refund of the amount she had paid as taxes (R. 52).

The Tax Court, affirmed by the Court of Appeals below, held that the income from the business conducted by Ann Davis, was the petitioner's income. The Opinion of the Tax Court (R. 261) contains the following:

> "After December 1, 1941 petitioner retained control of Royal's income and used it to his own benefit; he was the true owner of such income" and
>
> "The income realized from the operation of Royal during the calendar years 1942, 1943 and 1944 belonged to the petitioner and must be charged to him."

The Commissioner, respondent, included in his assessment of deficiencies the sum of $174,063.65 for the year 1943 and $7,706.75 for the year 1944, contending that these

amounts were over-ceiling receipts from sales of liquor during those years by the petitioner.

At the hearing, the petitioner testified that he had received these amounts and substantially more from customers whom he named, but were not called upon to testify, by either side. The petitioner further testified that during an extreme whisky shortage in the years involved, he found that it was impossible to obtain products for sale without payment of over-ceiling cash, in excess of ceiling prices fixed by the Office of Price Administration. The petitioner stated that he arranged with the named customers to obtain prepayment of these necessary over-ceiling amounts, made the purchases and delivered the whisky to the customers, taking only the permissible profit under OPA regulations. This permissible profit was substantially greater than the profit actually realized in transactions prior to OPA.

The petitioner testified that he paid from $6.00 to $7.00 per gallon over-ceiling for whisky, in cash, in addition to the invoice price of the above whisky. There is a sharp conflict between the petitioner's evidence and that of the respondent's witnesses, who were the suppliers of such bulk whisky.

The Tax Court stated its disbelief of the respondent's witnesses, but said that it could not believe that the petitioner would have incurred the risks involved without retention of some amount of the over-ceiling cash, and in the absence of record proof arbitrarily fixed these amounts at $50,000 for the year 1943 and $5000 for the year 1944 (R. 262-264).

In the decision of the Tax Court, fixing the amounts of deficiency and penalty, the petitioner's tax liability was increased by a reallocation of the amounts reported and

tax-paid by Ann Davis, from her tax year ending December 1 of each year, to the petitioner's calendar year basis; and by the inclusion of the amounts of $50,000 for 1943 and $5000 for 1944, estimated to be unreported over-ceiling cash retained by the petitioner, and no credit was allowed to the petitioner for the $49,884.93 paid in taxes to the Treasury of the United States from the income found to be the property of the petitioner and chargeable to him.

The Commissioner, respondent, filed his computation for entry of decision, on the above basis (R. 263-268). The petitioner filed objections to this computation contending that since the funds derived from the business conducted in his daughter's name, were, by judicial construction, held to be the property and income of the petitioner, he should be credited with the amount of such income that was actually paid in taxes to the United States, and that such amount should not be included in the deficiency, and that no fraud penalty should be imposed or interest accrued thereon (R. 269-271). These objections were overruled and the computation of the respondent was adopted and approved and deficiencies and fraud penalties in accordance therewith were imposed (R. 271, 272).

The Court of Appeals below affirmed the opinion and decision of the Tax Court in all respects.

REASONS FOR GRANTING THE WRIT.

I.

This case should be reviewed by this Court because the decisions below distort and exceed the purported rule in the *Cohan* case (*Cohan* v. *Commissioner*, 39 F. 2d 540) to permit the arbitrary assessment and determination of

tax deficiency, without substantial basis in law or fact under the evidence.

The decisions below further authorize and impose a tax and fraud penalty for deficiency upon income which has, in fact, been paid to the United States as income taxes, in violation of due process of law and without constitutional or statutory authority.

A.

The Tax Court, affirmed by the Court of Appeals below, purports to infer from the facts in the case that the petitioner did not incur the risks of over-ceiling transactions "without expectation of profiting from such sales to a greater degree than the rather modest legal mark-up did permit." This "modest" legal mark-up was fixed by the Office of Price Administration at 15% to a dealer. In cases where the dealer was also the bottler of whisky, an additional 15% as a processor was permitted under law (R. 177, 178). The petitioner testified, and was uncontradicted, that in the conduct of the business prior to the OPA regulations and the liquor shortage, the average mark-up on sales in the business was about 40¢ a case (R. 78).

Obviously, the desirability of continuing the business, and conducting the transactions involved in the testimony, was sufficiently motivated by the possibility of the legal mark-ups permitted by law, in contrast to the 40¢ average mark-up prior to the liquor shortage and OPA regulations.

All witnesses agreed that throughout the period involved there was an intense liquor shortage, because distillation had been stopped during the emergency of the war. All witnesses agreed that no substantial amount of

liquor was available without payment of over-ceiling prices.

R. G. Denhan, a witness for the respondent, testified that the price per gallon, in the market, was from $5.00 to $9.00 per gallon, in contrast to the maximum OPA fixed price of $1.65 per gallon.

The decisions below have ignored the petitioner's substantial motive for the activities, arising from the legal mark-ups. The Courts below, instead, have inferred that because there was risk involved the petitioner *must* have retained some of the over-ceiling cash. This inference was drawn despite the petitioner's sworn testimony that he did not retain any of the over-ceiling cash, but found it necessary to pay it all out to suppliers. Indeed, the petitioner testified that he arranged for prepayment of these over-ceiling amounts to him by the customers, and told in detail how the whisky thereby obtained was priced and apportioned to the customers after bottling (R. 100, 113, 245, 246). These customers were named by the petitioner as Pearson, Hayes and Castleman. These men did not testify, and no one contradicted the petitioner concerning these arrangements with the customers. The respondent had full knowledge of these customer witnesses before trial, and could have called them if they would contradict petitioner. The inference is that they would not. *Scanlon* v. *United States*, 323 F. 2d 382, 392.

The Tax Court stated that the testimony of the suppliers, called to testify by the respondent, was not truthful and stating its conclusion that these suppliers exacted "everything that the traffic would bear", the Court said, "They were in the 'driver's seat', and we have no doubt that they attempted to take full advantage of that fact." (R. 262).

Under these circumstances, it is urged that there was no basis in the evidence for the finding that the petitioner retained as income over-ceiling and over-invoice cash.

However, upon the unsubstantiated inference that the petitioner did retain some of this money, the Courts below went further and drew the inference that the amounts so retained were $50,000 in 1943 and $5,000 in 1944. Of course, this is inference upon inference.

There was absolutely no testimony in support of a basis for the determination of these amounts. They are, at best, speculative guesses.

The so-called rule in the *Cohan* case (*Cohan* v. *Commissioner*, 39 F. 2d 540), relied upon by both Courts below, originated in a case where Cohan, the petitioner, established to the satisfaction of the Court that he did have deductible business expenses, for which he had no data or memoranda which would exactly fix the amount. On such a basis a somewhat arbitrary amount was fixed as being the least amount of such expenses, and deductions were permitted to the taxpayer in that case, in these amounts.

The case at bar is not within the so-called "rule" of the *Cohan* case. The record in this case is completely devoid of any evidence that the taxpayer retained over-ceiling cash. The conclusion that he did was reached by inference without substantial support. Therefore, there was no evidentiary basis to support the conjecture or guess that the amounts were $50,000 and $5,000 in the respective years. The Tax Court had no more basis in the evidence for the figures adopted than for any other speculative figures, and its determination was whimsical and fanciful. No evidence of customary or standard with-

holding by persons in petitioner's position was produced as in *Roberts* v. *Commissioner of Internal Revenue*, 176 F. 2d, 221, 226.

It is respectfully submitted that the determination of these amounts and their inclusion in the deficiency constitute taxation without authority of law and deny the due process of law guaranteed by the Constitution.

B.

The Courts below, although judificially construing the business of Royal Distillers Products, its property and the income therefrom to be the sole property of the petitioner, have refused to construe that the amount, to-wit, $49,884.93, paid from the income from the business as income taxes on said income, should be credited to the petitioner in determining the amount of the deficiency.

The Tax Court, which was affirmed in all respects by the Court of Appeals, said in its Opinion at page 261 of the Record:

> "After December 1, 1941, petitioner retained control of Royal's income and used it for his own benefit; he was the true owner of such income. To the extent that Anne Davis' name appeared in connection with any of the investments made out of the profits of the business, we are satisfied that is merely represented an effort to keep up the pretense that she was the owner. The income realized from the operation of Royal during the calendar years 1942, 1943 and 1944 belonged to petitioner and must be charged to him."

In disposing of the petitioner's complaint in this regard, the Court of Appeals said, in the last paragraph of its Opinion:

> "Petitioner complains that to collect additional taxes from him upon the income of the liquor busi-

ness results in double taxation of that income, inasmuch as his daughter reported and paid a tax upon it. It appears from the record, however, that these taxes were paid from the income of the liquor business and that the daughter reported them as her own. It appears further that, upon being advised that she ought to protect herself by a claim of refund, she refused to do so. Thus, she had a remedy, and if she did not invoke it, the fault is hers; we are powerless to help her. Furthermore, she is not a party to this proceeding." (226 F. 2d 732, 734, 735).

The effect of the decision below is to charge the petitioner with an additional deficiency in the amount of almost $50,000, although this $50,000 has been construed by the lower Courts to be the property of the petitioner, chargeable to him as income, and paid from the income of which he was found to be the true owner. The fraud penalty assessed upon the deficiencies is in the amount of 50% of the deficiencies and, thus, this imposed an additional $25,000 liability upon the petitioner. Interest at the rate of 6% per annum has accrued at least from March 15, 1945 and, thus, the liability is increased further by more than 60%.

The petitioner respectfully contends that refusal by the Commissioners of Internal Revenue and the Courts below to credit him, in the determination of deficiency, with the amounts that were actually paid from the petitioner's judificially construed income, is inconsistent and unreasonable, and constitutes an imposition of taxes and deficiency penalties without any support in law.

Certainly, it was not the intention of Congress to authorize construction and administration of the Internal Revenue laws in a manner which would charge the petitioner with income wrongfully declared and reported by

a member of his family through misapprehension, and then to deny credit for taxes paid from such income.

The statement of the Court of Appeals, to the effect that Ann Davis, in whose name the taxes were paid, had a remedy but refused to invoke it, ignores the determination in the same opinion that the money paid as taxes was not hers, but was the property and the income of the petitioner. Thus, Ann Davis had no remedy, nor did the petitioner, other than this action for redetermination of deficiency. Ann Davis could not properly recover the taxes paid in her name, since it was not her property, but the property of the petitioner by the judicial construction in the opinions below.

It is respectfully submitted that if the Tax Court had the authority and jurisdiction to determine the tax deficiencies chargeable against the petitioner, it had the power and authority to determine the credits properly due to the petitioner, for taxes paid from his income. The determination of deficiency should be truthful in substance.

The economic effect of a decision such as this upon any taxpayer is tremendous and completely destructive. The taxpayer has no way open to secure credit for the income which was paid to the United States as taxes on that income, and the imposition of the fraud penalty and the accrual of interest between the dates of tax liability and final determination, make it impossible for the taxpayer to satisfy or pay a deficiency so determined, and be made whole by any method of refund of the tax only.

Insofar as the amount of income of the petitioner, which was actually paid from the income to the United States as taxes, it is difficult to perceive fraud. Penalty is only

authorized upon deficiency. It is respectfully contended that insofar as the amounts paid as taxes are concerned, there was no deficiency, and no fraud.

This matter presents a question which requires the determination of this Court in order to rectify and prevent manifest injustice, which has occurred without authority of law and in violation of due process of law, guaranteed by the Constitution.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

MAURICE J. WALSH,
Counsel for Petitioner.

APPENDIX.

Orders and Judgments of the Court of Appeals,

November 2, 1955,

"This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by counsel.

"On consideration whereof, it is ordered and adjudged by this Court that the decision of the Tax Court of the United States entered in this cause on September 17, 1954 be, and the same is hereby, AFFIRMED."

November 25, 1955,

"It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED."

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11373. OCTOBER TERM AND SESSION, 1955.

DAVID PLEASON, *Petitioner,*
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petition for Review of Decision of the Tax Court of the United States.

November 2, 1955.

Before DUFFY, *Chief Judge,* and FINNEGAN and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Petitioner, sometimes spoken of herein as taxpayer, seeks to set aside the decision of the Tax Court of the United States establishing certain deficiencies in income and victory taxes for the year 1943, in income tax for the year 1944 and penalties for those years. The findings of fact and the opinion of the court are reported in 22 T. C. 361. Inasmuch as it is the function of the trial court to weigh the evidence, draw inferences and declare the results, *Matthiessen* v. *Commissioner,* 194 F. 2d 659 (CA-2), *Burford-Toothaker Tractor Co.* v. *Commissioner,* 192 F. 2d 633, cert. den. 343 U. S. 941 (CA-5), our only function is to determine whether the findings are clearly erroneous, that is whether upon the whole record, there is substantial evidence to support them and whether the court erred as to the law. Inasmuch as the findings have been fully reported, we shall not repeat them. However, we have scrupulously examined the record, and are convinced that they are amply supported by the evidence and that the inferences drawn by the Tax Court are entirely reasonable.

The Tax Court found that the business of the Royal Distillers Products was conducted solely by the taxpayer. He was admittedly its sole proprietor prior to its alleged oral assignment to his daughter Anne. It found also that, after the purported exchange, the business continued to be conducted by the taxpayer and his employees in substantially the same manner as previously. All this appears fully from the reported opinion of the Tax Court, which concluded that the income for the years 1943 and 1944, though the company was purportedly conducted by Anne, was really that of the taxpayer; that, inasmuch as he was the sole proprietor and his daughter merely a figurehead, the income for those years should have been reported by him, and that, therefore, the deficiencies levied because the income was not so reported were proper.

A taxpayer cannot avoid income taxes by assigning his property to others if he reserves such control over the property or business transferred or the receipt of income produced therefrom as to make it reasonable to treat him as the owner or recipient of the income for tax purposes. *Helvering* v. *Clifford*, 309 U. S. 331, *Harrison* v. *Schaffner*, 312 U. S. 579; *Commissioner* v. *Sunnen*, 333 U. S. 591; *Stanton* v. *Commissioner*, 189 F. 2d 297 (CA-7). Nor will a transfer of income which has been earned or which will be earned by the services of the assignor be effective to relieve him of tax liability. *Lucas* v. *Earl*, 281 U. S. 111; *Helvering* v. *Eubank*, 311 U. S. 122. Inasmuch as the evidence fully justifies the Tax Court's finding that the business remained that of the taxpayer, the income earned therein was his. Indeed, we do not understand that the taxpayer seriously contends otherwise. Consequently, there is no escape from the decision that petitioner should have accounted for the income from the business in the two years in question.

The Commissioner had made a determination that income for the year of 1943 in the amount of $174,063.65, and for the year 1944 of $7,706.75 had not been reported and that these amounts should be included in the deficiencies for those two years. The two sums reflected the Com-

missioner's calculation of income from over-ceiling prices of liquor sold by the taxpayer in those years. The latter claimed that his profits from over-ceiling prices should be reduced by the over-ceiling costs which he had been compelled to pay to parties from whom he purchased. The taxpayer kept no records showing what his over-ceiling profits were and none showing what he had paid out in over-ceiling cost prices. His suppliers denied receiving over-ceiling prices. Quite naturally, the Tax Court encountered difficulty in getting at the truth. By examining all of the evidence and exercising its own judgment, it came to the conclusion that the Commissioner's determination of deficiencies was excessive, and that for the year 1943 the amount of unreported income was $50,000, and that for the year 1944 $5,000.

Petitioner claims that these figures reflect mere speculation. But the court had before it all of the circumstances surrounding the transactions, and the evidence was, we think, entirely sufficient to justify the determination. The case lies within the rule of *Cohan* v. *Commissioner*, 39 F. 2d 540 (CA-2), where at pages 543 and 544 the court, in discussing the uncertainty of expenses to be allowed the taxpayer, said: "Absolute certainty in such matters is usually impossible and is not necessary; the Board should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. * * * It is not fatal that the result will inevitably be speculative; many important decisions must be such." So here, the court had to make the best estimate it could from the evidence at hand and gave petitioner the benefit of the doubt as to the difference between over $185,000 and $55,000. We cannot say that this was erroneous.

It should be observed further in this connection, moreover, that when the Commissioner made a determination of deficiencies which was attacked by the taxpayer, the burden was upon the latter to overcome the determination. In this he failed completely, for he offered no evidence other than his own vague testimony to overcome it.

That testimony was merely that he had paid out over-ceiling prices, the number and amount of which he was wholly unable to supply. There was complete failure on his part, therefore, to meet the preponderance of evidence required of him in this respect. In that situation, the Tax Court had the right to refuse any deduction. However, it evidently believed it only fair to strike out some 70% of the deficiency levied by the Commissioner. The taxpayer can have no complaint in this respect.

The Tax Court, in considering the question of fraud, said: "As to the fraud issue, the burden was on the respondent. We think he sustained his burden. In each of the years 1943 and 1944 petitioner received cash in excess of the invoice prices on sales of Royal, and paid part of this excess to those from whom whiskey was purchased. His daughter, Anne, knew nothing about these receipts and disbursements and did not report them in her returns. The petitioner who knew about them and the profit which resulted therefrom failed to report the profit realized by him in his income tax returns for 1943 and 1944. His failure to report this profit in such returns is clear and convincing evidence of his fraudulent purpose. We have, therefore, found as a fact that a part of the deficiency for each of the years 1943 and 1944 is due to fraud with intent to evade tax. Moreoever, it has clearly been shown that the attempt to ascribe Royal's profits to Anne Davis was a sham, and it is plain that petitioner's failure to report such profits was deliberate and fraudulent." The evidence amply supports the conclusion that the transfer, the operation, the realization of income by the taxpayer and all the other circumstances presented convincingly proved a fraudulent attempt to evade income taxes. Indeed, the taxpayer pleaded guilty to an indictment charging just such an offense.

Petitioner complains that to collect additional taxes from him upon the income of the liquor business results in double taxation of that income, inasmuch as his daughter reported and paid a tax upon it. It appears from the record, however, that these taxes were paid from the in-

come of the liquor business and that the daughter reported them as her own. It appears further that, upon being advised that she ought to protect herself by a claim for refund, she refused to do so. Thus, she had a remedy, and if she did not invoke it, the fault is hers; we are powerless to help her. Furthermore, she is not a party to this proceeding.

Finding no error in the disposition of the case by the Tax Court, the decision is

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 709

DAVID PLEASON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 260-263) is reported at 22 T. C. 361. The opinion of the Court of Appeals (Pet. 2a-6a) is reported at 226 F. 2d 732.

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1955. A petition for rehearing, filed on November 17, 1955, was denied on November 25, 1955. (R. 1a.) The petition for a writ

of certiorari was filed on February 23, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

QUESTIONS PRESENTED

In asserting income tax deficiencies and fraud penalties against the taxpayer, the Commissioner determined that a wholesale liquor business which the taxpayer conducted in his daughter's name was owned by the taxpayer, and that both the recorded profits of that business—reported as income of the daughter—and unrecorded profits—resulting from black market sales of whiskey—were chargeable to the taxpayer. Although notified of the Commissioner's determination of resulting overpayments of her income tax, the daughter did not file refund claims to protect herself from the running of the statute of limitations.

The questions presented are:

1. Whether the evidence supports the conclusion of both courts below that the taxpayer failed to sustain his burden of proving that he did not retain at least 30% of the over-ceiling payments which he admittedly received from the black market whiskey sales.

2. Whether in computing the deficiencies in the taxpayer's income tax and the 50% fraud penalties applicable to such deficiencies the Commissioner was required to credit to the taxpayer the overpayments of his daughter's income tax.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) [As amended by Sec. 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or an agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then

50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).

(26 U. S. C. 1952 ed., Sec. 293.)

STATEMENT

The Tax Court's detailed findings (R. 251-260), which the Court of Appeals held to be "amply supported by the evidence" (Pet. 2a), may be summarized as follows:

From 1938 until the fall of 1941, the taxpayer, operating under a basic federal permit and annual licenses issued to him by the State of Illinois, was the sole proprietor of a wholesale liquor business conducted under the name of "Royal Distillers Products". In September 1941 the taxpayer's application for renewal of his annual state license was denied because he had filed certain false reports with federal officials regarding sales of liquor made by Royal. In December 1941, the taxpayer's daughter, Anne Davis, filed an application for a basic permit to conduct a wholesale liquor business as "Anne Davis, doing business as Royal Distillers Products". During the pendency of her application and appeals from its denial—the taxable periods in issue—the business, although carried on in her name, was conducted by the taxpayer as theretofore.

During this period the taxpayer sold whiskey on the black market for amounts in excess of the ceiling prices. The taxpayer's daughter, who was not

familiar with the business and seldom present, was not aware of these black market activities. The books and records of the business showed receipts of only ceiling prices for whiskey sold. Profits of the business as recorded in the books and records, deductions being taken for salary paid to the taxpayer, were reported as income of the taxpayer's daughter, and the tax on such income was paid out of the profits of the business. Almost all of the remaining profits were turned over to the taxpayer and used by him or for his benefit.

The taxpayer continued to be the owner of the business, assets and income of Royal. He retained at least 30% of the over-ceiling payments which he received from whiskey sales. A part of each of the deficiencies in his income tax for the taxable periods in issue was due to fraud with intent to evade tax.

In affirming the decision entered by the Tax Court on the basis of these findings, the Court of Appeals also rejected the taxpayer's contention that he was entitled to have credited against the deficiencies in his income tax the overpayments of his daughter's income tax notwithstanding the fact that she had refused to protect herself by filing a claim for refund of those overpayments prior to the running of the statute of limitations. (Pet. 5a-6a.)

ARGUMENT

The taxpayer apparently does not now take issue with the determination of the Commissioner and both courts below that the income of Royal Distillers Products should be charged to him, and that

a part of each of the deficiencies in his income tax was due to fraud with intent to evade tax. The taxpayer rather attacks, on two grounds, the amount of the deficiencies and fraud penalties asserted against him. First, he challenges the correctness of the concurrent conclusions of the courts below that he failed to sustain his burden of proving that he did not retain at least 30% of the overceiling payments which he admittedly received from whiskey sales. (Pet. 7-10.) Second, he disputes the holding that the deficiencies in his income tax should not have been reduced by overpayments of his daughter's income tax before the 50% fraud penalty was applied. (Pet. 10-13.) We submit that the taxpayer's contentions are clearly without merit; that no conflict in decisions is asserted or presented; and that the petition should, accordingly, be denied.

1. Although admitting that, according to his own testimony, the over-ceiling payments which he received from whiskey sales substantially exceeded the amount ($181,770.40) determined by the Commissioner (Pet. 4-5), the taxpayer asserts (Pet. 9) that the courts below relied only upon unsubstantiated inferences in concluding that he retained at least $55,000, or approximately 30%, of this amount. That argument overlooks both the taxpayer's burden of proof and the nature of the evidence introduced on this issue.

It was, of course, incumbent upon the taxpayer to prove incorrect the Commissioner's determination that he had retained the over-ceiling prices which he had admittedly received from whiskey

sales. Moreover, there was a sharp conflict in the evidence in this issue. On the one hand, the taxpayer admitted that no record was kept of over-ceiling prices which he allegedly paid his suppliers (R. 102, 142), and testified that the amount of over-ceiling payments which he received on sales was similar to and offset by the amount of the over-ceiling payments which he made on purchases (R. 145). Specifically, the taxpayer testified that an over-ceiling payment was made in New York City in the presence of Mr. Denham to a man named "Greenwald or Greenfield or something like that" on the purchase of 100 or 120 barrels of whiskey (R. 121-122), and that over-ceiling payments were made to Mr. Blumenthal and Messrs. Eastman and Moll (R. 96-117). On the other hand, not only was the taxpayer's general credibility impeached by showing that he had been convicted of three different federal offenses (R. 83, 130-132), but his specific testimony was flatly contradicted by the Commissioner's witnesses. Thus, Mr. Denham, while admitting that he had been engaged in black market activities with the taxpayer, testified that the New York City transaction which the taxpayer described in some detail never took place (R. 235), and Mr. Blumenthal and Messrs. Eastman and Moll denied that they had ever received over-ceiling prices for liquor sold to the taxpayer * (R. 165, 168, 185-186, 214-215). The trier of facts, who saw

* Of course—the question being not whether the taxpayer received over-ceiling payments from his customers but whether the entire amount of such payments was passed on to his suppliers—the crucial witnesses were the suppliers rather than customers as taxpayer seems to suggest. (Pet. 8.)

and heard the witnesses, concluded that neither the taxpayer nor his suppliers were being entirely truthful and that, under the circumstances, the only credible explanation was that each profited from their blackmarket activities. (R. 262.)

Accordingly, in holding that the taxpayer failed to sustain his burden of proving that he did not retain at least 30% of the over-ceiling prices which he admittedly received, the courts below properly applied the well established rule of approximation enunciated in *Cohan* v. *Commissioner,* 39 F. 2d 540, 544 (C. A. 2d).

2. Notwithstanding the conclusion of the courts below that the taxpayer's failure to report the income of Royal Distillers Products was "deliberate and fraudulent" and that the attempt to ascribe that income to his daughter was a "sham" (R. 260; Pet. 5a), the taxpayer argues (Pet. 10-13) that the deficiencies in his income tax should have been reduced by the overpayments of his daughter's income tax before the 50% fraud penalty was applied. It is, however, fundamental that, absent special statutory provisions (such as those dealing with husband and wife), the income tax liability of each individual taxpayer is computed separately. It is also clear that the 50% fraud penalty imposed by Section 293(b) of the Internal Revenue Code of 1939, *supra,* pp. 3-4, is to be applied to the separately computed deficiency of the individual taxpayer with respect to whom that section applies. The taxpayer and his daughter are, of course, separate taxpayers, and, even aside from imposition of

fraud penalties, there is no authority for requiring an overpayment of tax by one taxpayer to be credited against a tax deficiency of another. *Vayssie* v. *Commissioner,* 8 B. T. A. 587; *Perine* v. *Commissioner* 22 B. T. A. 201; *Hunt* v. *Commissioner,* 47 B. T. A. 829; *Roebling* v. *Commissioner,* 28 B. T. A. 644, reversed on other grounds, 78 F. 2d 444 (C. A. 3d); *Harrold* v. *Commissioner,* 22 T. C. 625. Moreover, even where separate taxpayers are not involved, Sections 3774 and 3775(b) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sections 3774 and 3775), preclude an overpayment, refund of which is barred by the statue of limitations, from being credited against additional tax liability. And, although notified of the Commissioner's determination of overpayments (R. 52), the taxpayer's daughter, as the Court of Appeals indicated (Pet. 6a), refused to file a protective refund claim before the statute of limitations had run.

CONCLUSION

The decision below is correct. There is no conflict in decisions. No other reason appears which would warrant further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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